DATE: APRIL 2, 1996

CASE NO: 94-INA-574

In the Matter of

E & E LANDSCAPING CO., INC.
Employer

on behalf of

SEBASTIAO FLAUSINO MEDINA
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from E & E Landscaping's ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On September 30,1991, the Employer filed a Form ETA 750, Application for Alien

Labor Certification, with the New Jersey Division of Employment Services on behalf of the Alien, Sebastiao Flausino Medina. AF 20-21. The job opportunity was listed as "Landscaper/Welder." AF 20. The duties of the job were described as follows:

> Plan and execute landscaping operation and maintain grounds of private and business residences. Prepare and grade terrain; apply fertilizers; seeding and sodding of lawns; transplanting and prune shrubs and trees. Mow, trim, cultivate gardens. Use of hand and power equipments. Dig trenches and install drain pipes; make repair to concrete and asphalt walks and driveway. Clean, service and repair power machinery to ensure operating efficiency. Weld together metal components of pipelines as well as other metal structural components use[d] in landscaping.

AF 21.

On March 28, 1994, the CO issued a Notice of Findings ("NOF"), proposing to deny certification on several grounds. AF 61-64. First, the CO questioned whether there was actually permanent and full-time "employment" available to the Alien because landscaper jobs are normally seasonal. The CO indicated that the Employer could rebut this finding by documenting that permanent full-time employment is guaranteed for the position throughout the year. In this regard, the CO stated that the Employer:

> . . . must explain in detail what duties, relative to this position, the employee in this position will perform during the winter months and show that there is a full-time (40 hour work week) need for the employee to perform those services during the non-seasonal period. He must also submit evidence of payroll records for the winter months (November thru March) which show that he employs or has employed workers in this position on a full-time basis during that period. In addition, Employer should document the number of years he has been in business; the number of laborers that employer had on staff in each of the last 3 years; the number of months each laborer worked in each of the last 3 years; submit copies of payroll records to support the facts.

AF 63. Second, the CO found that the duties of landscaper and welder are not normally combined. She therefore required that, pursuant to 20 C.F.R.§656.21(b), the Employer either document that the combination of duties arises out of business necessity, or amend the job duties. Third, the CO found that the Employer's wage offer was below the prevailing wage and therefore in violation of 20 C.F.R. §656.20(c)(2). Accordingly, the CO required the Employer to adjust the wage appropriately. Finally, the CO noted that the G-28 filed with the application indicated only that the attorney is representing the Alien, and she therefore directed the attorney to file an amended G-28 if he was, in fact, representing the Employer.

On May 2, 1994, the Employer filed its rebuttal. AF 65-69. Included in the rebuttal was a statement that the Employer was willing to amend its application, listing the position as "Landscape Gardener," and re-advertise. The Employer also amended its wage offer to correspond to the prevailing wage for the position. In addition, the attorney submitted a G-28 indicating that he was representing both the Employer and the Alien. In regard to the issue of "employment," the Employer submitted a letter which indicated the nature of its business, the number of years that it has been in business, the number of employees that it has employed during the past three years, the number of employees that it employs during the winter months, and the duties that a "Landscape Gardener" performs during the winter months. AF 66-67. No other documentation was included in the rebuttal.

The CO issued a Final Determination ("FD") denying certification on May 10, 1994. AF 70-72. The CO indicated that the Employer's documentation had satisfactorily rebutted the 20 C.F.R. §§656.21(b) and 656.20(c)(2) violations. However, the CO found that the Employer had not adequately documented that it could provide the Alien with "employment," as that term is defined in Section 656.3 of the regulations.[1] The CO noted the information provided by the Employer in its rebuttal letter. However, she stated that the Employer had not indicated that the individuals it employed during the winter months were permanent and full-time and that the Employer had not provided payroll records supporting its statements. The CO concluded that:

> Absent copies of payroll records to support employer's statement, which employer was directed to supply in our Notice of Findings, employer's statement is not adequate to document that permanent, full-time, year-round work can be guaranteed for this position.

AF 70.

On June 16, 1994, the Employer filed a Request for Review and Reconsideration of the denial of the labor certification application it filed on behalf of the Alien. AF 77-89. Attached to the Employer's Request for Review and Reconsideration are payroll records which the Employer argues support its contention that it employs "numerous individuals in a permanent year-round capacity." AF 87. On August 8, 1994, the CO denied the Employer's request for reconsideration and forwarded the application to this Board for review. AF 90.

DISCUSSION

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp,* 87-INA-659 (Jan. 13, 1988)(*en banc*). Here, the CO specifically requested that the Employer furnish her with copies of its payroll records in an attempt to determine whether the Employer could provide the Alien with permanent, full-time employment. Thus, the requested documentation was crucial to the determination of the Employer's application.

In its Request for Review, however, the Employer argues that this documentation was not obtainable by reasonable efforts. According to the Employer, its accountants were preoccupied with their clients' tax returns during April of 1994, and therefore "were unable to supply [Employer] with the necessary records in a timely manner." AF 86. In addition, the Employer states that the "excessive workload" that it experiences with the advent of the "outdoor season" in April "created havoc" in its attempt to communicate with its accountants during this period. *Id.*

Employer's arguments are not convincing. We note that in its rebuttal to the NOF, the Employer stated that "[d]uring the winter months (November thru March) *our records reflect* that we employ 18 people on payroll." AF 67. The Employer did not, however,

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[1] *Employment* means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employer.

20 C.F.R. §656.3.

include the records that it was referring to in its rebuttal. Even if not the actual payroll records, the Employer should have submitted these records in support of its contentions. The NOF gave the Employer sufficient notice that the CO was requiring the Employer to provide objective evidence of "employment." Furthermore, we note that the Employer did not state that it was unable to obtain payroll records in its rebuttal to the NOF, but, instead, waited until after the FD was issued to make this claim. An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center - Mental Retardation Services*, 88-INA-40 (July 5, 1988), especially where the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991).

Furthermore, we note that even if the payroll records provided by the Employer had been considered by the CO, these records would not be sufficient to rebut the CO's finding that permanent, full-time "employment" does not exist. In the NOF, the CO required the Employer to "show that there is a full-time (40 hour work week) need for the employee to perform [landscaper/welder] services during the non-seasonal period." The payroll records provided by the Employer show the number of employees that worked for the Employer during the winter months, but they do not show that the Alien or any other employees worked full-time performing the specified job duties. Moreover, we note that the Employer's rebuttal letter does not indicate that these employees worked on a full-time basis. Since the Employer failed to meet its burden of proof, this alien labor certification was correctly denied by the CO.

ORDER

The CO's denial of certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg